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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 295

H. P. WELCH COMPANY,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

THOMAS P. CHENEY,
Attorney General of New Hampshire;
FRANK R. KENISON,
Assistant Attorney General;
DUDLEY W. ORR,
Counsel for Appellee.

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SUPREME COURT, STATE OF NEW HAMPSHIRE

1938 TERM

H. P. WELCH COMPANY,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE,

Appellee.

STATEMENT OPPOSING JURISDICTION.

Pursuant to Rule 12, paragraph 3, Rules of Supreme Court of the United States comes now The State of New Hampshire, appellee in the above entitled case and discloses the following matter making against the jurisdiction of the Supreme Court of the United States as asserted in a statement of the basis of appellate jurisdiction filed by the appellant on the 14th day of July, 1938.

Statement of the Case.

The appellants herein are common and contract carriers by motor vehicle who do business in New Hampshire that is both interstate and intrastate. Appellants violated a State statute prohibiting operation of motor vehicles upon the highways of the State by drivers who had been on continuous duty more than twelve hours (New Hampshire Laws 1933, Ch. 106, s. 8) after the enactment of the Federal Motor Carrier Act (49 Stat. 543, 49 U. S. C. A. 301-327) but before

the Interstate Commerce Commission had promulgated its requirements as to maximum hours of service of employees, and consequently before any federal regulation of hours of service was in effect. The State statute (New Hampshire Laws 1933, Ch. 106, ss. 3 and 4) excluded from its operation certain classes of carriers among whom appellants do not fall.

As punishment for violation of the State statute, the State Public Service Commission suspended the right of appellants to do an *intrastate* business in New Hampshire for a period of five days. The New Hampshire Supreme Court dismissed the appeal of the appellant wherein it urged the same objections to the State statute that it presents to this Court. The right of appellants to carry on an interstate business has not been restricted by the State except as the regulation of its intrastate operations may touch and effect appellant's interstate business. The *Motor Carrier Act* expressly reserves the regulation of intrastate motor vehicle operations to the States. 49 U. S. C. A. Sec. 302 (c) provides:

> "Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

The validity of the State statute in the absence of Federal regulation is not challenged.

Argument.

I. The contention that the State statute violates the "equal protection clause" of section one of the Fourteenth Amendment is utterly lacking in merit. The exemptions

granted by the statute are found in New Hampshire Laws, 1933, Ch. 106, ss. 3 and 4.

> "3. *Contract Carrier Registration.*—The term contract carrier as used in this act shall include every person, firm or corporation transporting property for hire by motor vehicle on any public way in this state, other than common carrriers, those transporting products of their own manufacture or labor and those exempted in section 4 of this act. * * *
>
> "4. *Exemptions.*—There shall be exempted from the provisions of this act: I. Motor vehicles not principally engaged in the transportation of property for hire. II. Motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten-mile limit on occasional trips, not exceeding two trips in any third-day period. III. Motor vehicles while engaged exclusively in work for any branch of the government of the United States or for any department of this state, or for any county, city, town or village. IV. Motor vehicles engaged exclusively while in the delivery of the United States mail."

Exemptions of this character or ones even more arbitrary have been sustained by this Court.

> "The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the class of operations, which by reason of their habitual and constant use of the highways, brought about the conditions making regulation imperative." *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 373.

Packard v. *Banton*, 264 U. S. 140; *Bekins Van Lines, Inc.* v. *Riley*, 280 U. S. 80; *Alward* v. *Johnson*, 282 U. S. 509; *Sproles* v. *Binford*, 286 U. S. 374; *Hicklin* v. *Coney*, 290 U. S. 169; *South Carolina State Highway Department* v. *Barnwell Bros. Inc.*, — U. S. —, 82 L. Ed. 469.

II. The issue presented in this case of whether or not the Federal regulation of interstate commerce supersedes the State law touching the same subject matter has been decided by this Court repeatedly in accordance with the decision below. At the time of the violations for which appellants were prosecuted the regulations of the Interstate Commerce Commission were not only not effective but they were not even in existence. In such a situation it is beyond debate that there is no supersedure.

The Federal Motor Carrier Act did not envisage an immediate adoption of hours of service regulations by the Interstate Commerce Commission. The fact is that Federal regulation will not become effective until almost exactly three years after the enactment of the Motor Carrier Act *Ex Parte No. MC-2.* Interstate Commerce Commission. Congress did not intend to free the motor carrier industry from all control of hours of service until the Interstate Commerce Commission could act administratively to prescribe hours of service.

Northwestern Bell Tel. Co. v. *Nebraska State Railway Commission*, 297 U. S. 471; *Smith* v. *Ill. Bell Tel. Co.*, 282 U. S. 133; *Missouri Pacific Railway Co.* v. *Larabee Mills Co.*, 211 U. S. 612.

It is, therefore, submitted that this appeal should be dismissed or the judgment below should be affirmed.

Respectfully,

THOMAS P. CHENEY,
Attorney General of the State of New Hampshire;
FRANK R. KENISON,
Assistant Attorney General;
DUDLEY W. ORR,
Counsel for Appellee.

SUPREME COURT, STATE OF NEW HAMPSHIRE

1938 TERM

H. P. WELCH COMPANY,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE,

Appellee.

MOTION TO DISMISS OR AFFIRM.

Now comes The State of New Hampshire, the appellee herein by Thomas P. Cheney, its duly appointed qualified and acting Attorney General, and moves the Supreme Court of the United States to dismiss with costs the appeal taken herein to it by the H. P. Welch Company, appellant, upon the following ground:

(1) It is manifest that the only Federal questions raised by the said appeal have been so explicitly decided by the Supreme Court of the United States in accordance with the decision of the Supreme Court of the State of New Hampshire as to foreclose further argument on the subject.

In the alternative appellee moves this Court to affirm the judgment from which the appeal in the above entitled cause purports to have been taken on the following ground:

(1) It is manifest that the decision of the Supreme Court of the State of New Hampshire dismissing the appeal of

appellant from the Public Service Commission of the State of New Hampshire is correct.

THOMAS P. CHENEY,
Attorney General;
FRANK R. KENISON,
Assistant Attorney General;
DUDLEY W. ORR,
Counsel for Appellee.

Service of the within motion to dismiss or affirm and of the foregoing and attached statement opposing jurisdiction acknowledged this twenty-eighth day of July, 1938.

ROBERT W. UPTON,
Counsel for Appellant.

A true Copy. Attest:

GEORGE O. SHORN,
Clerk of the New Hampshire Supreme Court.

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APPEA

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